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No. 96-1824

In the
Supreme Court of the United States
October Term, 1996

GARY LEE, M.D., individually and on behalf of his terminally ill patients; WILLIAM PETTY, M.D., individually and on behalf of his terminally ill patients; JANICE ELSNER, individually and as representative of a class of terminally ill patients; et al.,

Petitioners,

v.

F. DOUGLASS HARCLEROAD, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEFS IN OPPOSITION

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I. This is no 'mere' standing case; it poses undecided, profound, and nationally important standing issues.

This case poses standing issues, but not 'mere' standing issues. They are extraordinary, undecided, profound, nationally important. 1) Who may challenge a regime of assisted suicide that imposes disparate treatment on terminally ill persons? 2) Who may challenge an assisted suicide scheme that requires persons morally opposed to assisting suicide to participate in it? 3) Is stigmatic injury, recognized by this Court and the Sixth Circuit but now rejected by the Ninth Circuit, a proper ground for standing?[1] 4) If physicians may represent their terminally ill patients who want assisted suicide, may not physicians also represent their terminally-patients who want the protections of Oregon's presumptions and laws against assisted suicide?

This Court said that a "State's prohibition on assisted suicide ... both reflects and advances its commitment to" "an unqualified interest in the preservation of human life." *Washington v. Glucksberg*, 117 S. Ct. 2258, 2272 (1997) (quotation marks and citation omitted). If Oregon advances its commitment to protecting the lives of its citizens by a ban on assisted suicide, but refuses to do so for terminally ill persons, then should not terminally ill citizens have standing to challenge such a stigmatic injury?

This Court said that a ban on assisted suicide for all persons "goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and societal indifference." *Id.* at 2273 (internal quotation marks and citation omitted). A "State's assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill ... people must be no less valued than the lives of the young and healthy, and that a seriously disabled person's suicidal impulses should be interpreted and treated the same way as anyone else's." *Id.* If Oregon refuses to protect terminally ill

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[1]The Sixth Circuit clearly recognized stigmatic injury for standing in circumstances closely analogous to those of this case. *See infra* at 4 n.2. The Ninth Circuit's refusal to do so in the present case creates a conflict between the circuits, a reason for granting certiorari.

persons from coercion and prejudicial stereotypes, refuses to equally value their lives, and declines to interpret and treat their suicidal impulses in the same way that it protects others, then may not terminally ill persons challenge this equal protection violation?

This Court said that "legal physician-assisted suicide could make it more difficult for the State to protect depressed or mentally ill persons ... from suicidal impulses." *Id.* May not terminally ill persons subject to this risk challenge the law which strips them of the same presumptions and protections afforded other Oregonians without having to be in the throes of a suicidal depression that makes them unwilling and unable to sue to protect their rights?

Remarkably, Oregon says "no." The State concedes that "[i]t may be ... that a person who is suicidally depressed and seeking physician-assistance in dying due to that depression will not be willing to sue to invalidate Measure 16." *Or. Br.* at 23 n.12.

The State's solution? Maybe family members would have standing and bring a case. *Id.* Of course, as the State admits, family notification is not required, but, Oregon argues, "[i]f the number of terminally ill persons likely to act out of severe depression ... is as great as plaintiffs speculate, there should be ample family member plaintiffs to bring that case." *Id.*

Never before has the vindication of one's rights required reliance on the vicissitudes of family awareness and willingness. Yet, with life at stake, this is the State's only solution. And while we wait for such a possible case, vulnerable people will be dying against their true wishes because "[t]hose who attempt suicide—terminally ill or not—often suffer from depression or other mental disorders." *Glucksberg*, 117 S. Ct. at 2272. And "[t]he New York Task Force ... expressed its concern that, because depression is difficult to diagnose, physicians ... often fail to respond adequately to seriously ill patients' needs." *Id.* at 2273.

Finally, if Oregon were correct in its disputed assertion that no Petitioner has standing under ordinary rules, then this case presents the *undecided* question of whether the rules of standing should be extended to accommodate review of laws such as Measure 16. Plaintiff Eric Dutson's death of AIDS before the trial court

decision indicates that this is a case that is capable of repetition yet evading review. If only people who actually die within six months can prosecute such a case, then Measure 16 can never be tested for constitutionality.

The States and the courts need the guidance of this Court. As states experiment with assisted suicide issues, their experiments must be open to constitutional scrutiny. How and by whom these experiments may be tested is clearly a 'certworthy' question.

II. Terminally ill Petitioners have present, stigmatic injury and have claimed so from the beginning.

The discrimination created by Measure 16 causes an immediate, stigmatic injury to the terminally ill Petitioners, *Pet.* at 23-26, an injury not contingent on future harm resulting from Measure 16's inadequate "safeguards." It exists because Measure 16 renders them innately inferior to other Oregonians, and therefore unworthy of the full and unqualified protection of criminal and civil law against assisted suicide provided to other Oregonians. *See Heckler v. Mathews*, 465 U.S. 728, 739 (1984); *see also Br. Amici Curiae in Support of Pet. For Writ of Cert. on Behalf of American Disabled for Attendant Programs Today et al.* at 8-18.

In response, Oregon claims that the terminally ill can suffer no cognizable harm "unless and until they obtain a lethal prescription by following all of the special procedures the Measure 16 requires." *Or. Br.* at 18. They must first obtain the lethal prescription, then compete for the presumptions and protections of law sheltering other Oregonians from assisted suicide.

But any "allegation that some discriminatory classification prevented the plaintiff from competing on an equal footing in its quest for a benefit" states an injury sufficient to establish standing. *Northeastern Florida Contractors v. Jacksonville*, 113 S. Ct. 2297, 2304 (1993). The plaintiff need not allege the competition had been entered. *Id.* Here, terminally ill persons cannot equally compete for the benefit of Oregon's protective assisted suicide laws. They need not allege they have successfully excluded themselves from the protection of these laws before they can complain that such a

discriminatory exclusion exists.[2]

The State claims an immediate, stigmatic injury "is not alleged in the complaint or established in the record." *Or. Br.* at 19. But all the Petitioners specifically claimed such a harm:

> Oregon has by Ballot Measure 16 determined that the lives of persons who have the disability of a terminal disease, who are suffering from depression, mental and/or emotional disability, or undue influence, are not entitled to being protected from self-harm and assisted suicide by Oregon law. [*Third Amended Complaint* at ¶ 31.]

The Petitioners claimed "imminent" harm (*id.* at ¶ 21); they alleged that "Ballot Measure 16 creates a class of terminally ill persons whom it strips of these [protective legal] benefits afforded others." *Id.* at ¶ 51.[3]

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[2]In *Neighborhood Action Coalition v. Canton*, 882 F.2d 1202 (6th Cir. 1989), the court found standing based on an allegation that, as a result of a racially discriminatory city policy, there was "little or no police response" to neighborhood calls. *Id.* at 1017. The plaintiff in *Canton* was not required to allege that criminals were in fact poised outside neighborhood doors prepared to deprive residents of life or property in the absence of adequate police protection. Likewise, the terminally ill in this case need not stand poised at the brink of state-sanctioned suicide before they may complain that the State has opened such a chasm in its law before them.

In *Smith v. City of Cleveland Heights*, 760 F.2d 720 (6th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986), the court found that an African-American resident of the City had standing because the City's housing policy at issue created a stigmatic injury by "directly affect[ing] [the plaintiff's] interest in his own self-respect, dignity and individuality in his own town" through "imposing a badge or label of inferiority on him based purely on race." *Id.* at 722. He was compelled to live out "daily routines and neighborhood interactions as a member of a race which his own City labels as undesirable." *Id.* Although the City's motive for unequal treatment may have been "benign," that the plaintiff had to "live on a daily basis with the sense of disrespect officially established by law" was sufficient injury to warrant standing. *Id.* at 723. The terminally ill in this case suffer an even greater immediate stigmatic injury as the result of Measure 16—they must wear a label of inferiority announcing that their very lives are less worthy of protection than the lives of all other Oregonians.

[3]Janice Elsner also alleged that Measure 16 "increas[ed] the vulnerability of

The record was reviewed by the trial court before it found there was sufficient evidence to support allegations of injury. *App.* at 59a-60a.[4] The court also found that the lower standard of care for the terminally ill imposed by Measure 16 in itself "would confer standing on the plaintiffs" for the purpose of an equal protection challenge, *id.* at 1427, i.e., the record supported an allegation of immediate and stigmatic harm if Measure 16 took effect.[5]

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persons like herself to request assisted suicide despite their true intent." *Id.* at ¶ 8. Plaintiff Eric Dutson asserted that "Ballot Measure 16 rests on the judgment that the lives of patients who have the disability of a terminal disease are less deserving of protection than others." *Id.* at ¶ 6.

[4]For example, Janice Elsner testified that "Measure 16 creates a financial incentive to subject me to undue influence to end my life prematurely, and terminal illness could render me susceptible to such influence" and "[w]ith assisted suicide the law, the possibility of suicide will crowd in upon one." *Answers to First Set of Interrogatories*, No. 3. She testified that she believed that"[e]nding one's life prematurely forfeits [opportunities for courage, fortitude, and increased intimacy], and Ballot Measure 16 creates inducements for the terminally ill to forfeit them, and incentives for others to encourage them to do so." *Elsner Aff.* at ¶ 4.

[5]In an effort to avoid a present, stigmatic injury, Respondents Goodwin, Lee & Sinnard assert that the lowered "good faith" standard applies neither to the diagnosis of terminal disease nor "in *any instance* under the Act." *Goodwin Br.* at 5-6 (emphasis added). This would make the "good faith" clause superfluous and is contrary to the holding of the district court, the only court to reach the merits of this case:

> The court finds that there is no set of facts under which it would be rational for terminally ill patients under Measure 16 to receive a standard of care from their physicians under which it did not matter whether they acted with objective reasonableness, according to professional standards. This defect goes to the very heart of the State's reliance on person's consent to die. *The physician is allowed to negligently misdiagnose a person's condition and competency and negligently prescribe a drug overdose, so long as those actions are in "good faith."* [*App.* at 51a (emphasis added).]

III. This Court is not required to decide facts to recognize Janice Elsner's standing; the district court has already decided the facts and was not reversed.

Because this Court does "not [ordinarily] grant a certiorari to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925), Oregon tries to create a factual issue by alleging that Janice Elsner is not really terminally ill. *Or. Br.* at 12. Respondents Levin and Shuck correctly concede that "Petitioner Elsner is terminally ill," noting that "[t]he District Court found she is, Pet. App. 59a, and the Court of Appeals assumed she is, *id.* at 10a." *Levin Br.* at 3 & n.1. There is no need for this Court to reopen the matter here. The lower courts are fully supported by the record.

As the district court noted, Measure 16 affects any adult with an "incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six (6) months." *App.* 59a. Applying this standard, the court held that Janice Elsner was "qualified" under Measure 16 and denied standing to other patients who were not. *Id.* at 59a-60a & n.1.

The court noted that Janice had been diagnosed with "a progressive form of muscular dystrophy," a terminal disease, and that "she has already lived longer than doctors expected," i.e., she had been given a prognosis of death in less than six months. *Id.* at 59a. In contrast, the court denied standing to Claudine Stotler, who "was told in 1992 that she had six months to live," due to metastasized cancer for which she had multiple surgeries from 1992-1994, but who "ha[d] not received an update on her prognosis." *Id.* at 60a n.1.

The district court based its findings on the record. *App.* at 60a. And the record shows that Janice stated that she "had dermatomyositis, a progressive form of muscular dystrophy," that she had "already lived longer than expected," that sometimes "during the last three years [she] had been so weak that [she] could not turn over in bed," that at such times she "was limited to a liquid diet because [she] was too tired to eat," that she "spen[t] much of [her]

time in bed," and when not in bed she was "confined to a wheelchair." *Elsner Aff.* at 2. When asked what prognosis she had been given, she said "[a]t the moment we're on a day-to-day basis." *Elsner Dep.* at 13. It is true, as Oregon notes (*Or. Br.* at 4), that in response to the specific question of whether "anybody had suggested or told you that you ought to put your things in order, that you might not be around in the next five months or six months," she answered "[n]o." *Id.* at 13-14. However, this response was plainly provoked by the manner in which the question was framed: She simply meant that no one had told her to put her affairs in order, not that she had been told that she would not imminently die. With her "day-to-day" response, she had already indicated she had been told she could die any day.

The Ninth Circuit, ignoring this evidence in its own overly-literal approach to Elsner's testimony, stated that Janice "ha[d] not been given a prognosis of less than six months to live." *App.* at 10a, 15a n.2. However, the court proceeded to assume she was terminally ill for its analysis. *Id.* It noted, in any event, "that the named doctors and residential care facilities could assert the interests of their terminally ill patients," *App.* 10a, a claim that remains alive before this Court. *See infra* at 9-10.

Oregon also makes the unabashed claim that "[n]o credible argument can be made on this record that Ms Elsner is imminently in danger of suicidal depression ... that would cause her to obtain a lethal prescription under Measure 16." *Or. Br.* at 15. The trial court found she has a history of recurring "clinical depression that result[s] in ambivalence about whether she want[s] to continue living." *App.* 59a-60a (discussed at *Pet.* at 16-17). Oregon's effort to vitiate this finding and evidence by stating that Janice said "she couldn't foresee herself seeking a physician-assisted death under any scenario," *Or. Br.* at 15, misses the point. Janice's concern is that in the midst of one of her recurring suicidal depressions she would seek assistance in suicide—against her present will and intent—and because of lowered standards and lack of safeguards she would be assisted to her death. She is entitled to the same

protection against this individualized threat as other Oregonians.[6]

IV. The health care providers have standing.

The health care provider Petitioners face criminal, civil, and disciplinary penalties if they refuse to facilitate suicide under Measure 16. *Pet.* at 26-30. In violation of their religious beliefs and moral convictions, Measure 16 commands them to: a) aid in suicide or permit it on their premises; b) associate with and allow within their organizations physicians who aid suicides; c) transfer patient records to doctors willing to aid suicides; d) provide witnesses to written directives for aid in suicide; and e) inform patients of their "right" to assisted suicide (as part of their legal duty to give treatment options).

The State's glib response is that Petitioners' "claim might have merit if they could identify some provision in Oregon's criminal code imposing criminal penalties on a physician or health care provider for refusing to transfer a patient's records, refusing to advise the patient of available medical procedures, and so on." *Or. Br.* at 21. This response is misleading and inadequate.

First, Petitioners *have* identified criminal provisions applicable to health care providers refusing to comply with Measure 16. *Pet.* at 27 (citing Or. Rev. Stat. § 161.555(3); Measure 16, § 4.02(4)). The State argues that the "obvious point" of § 4.02(4) is to subject physicians who *aid* in suicide to criminal penalties if they do not comply with "the requisite procedures" of Measure 16, namely, a "terminal diagnosis, a properly witnessed request, waiting periods, [and] second physician assessment." *Or. Br.* at 20-21. But Oregon gives no reason why § 4.02(4) does not also subject physicians to criminal penalties if they do not abide by other "requisite proce-

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[6]Oregon asserts that Janice "could not identify any injury she has suffered due to Measure 16." *Or. Br.* at 6. She has clearly identified several as evidenced in her *Third Amended Complaint* (*see, e.g.*, ¶¶ 7, 31, 52), including the threat of present, stigmatic injury discussed *supra* at 3-4. Also, the State's notion that because she was opposed to Measure 16 before passage, *Or. Br.* at 6, she is somehow not now a credible plaintiff is ludicrous. Janice was opposed to Measure 16, then as now, because she views it as a threat to herself and similarly vulnerable persons. *Third Amended Complaint* at ¶ 7.

dures" of Measure 16—such as those that require transfer of patient records, providing witnesses, complying with informed consent formalities, and permitting assisted suicide on their premises. Although such conduct is not defined as a specific criminal offense like murder or assault, Oregon law states that "[a]n offense defined by a statute of this state, but without specification as to its classification or as to the penalty authorized upon conviction, shall be considered a Class A misdemeanor," a statute to which the State and other Respondents studiously avoid reference. Or. Rev. Stat. § 161.555(3). Here, for example, a failure to transfer records *is* defined as an offense because that is one of the "requisite procedures" of Measure 16.

Second, none of the Respondents dispute the other, non-criminal injuries with which the Petitioners are presently and imminently threatened. Failure to comply with Measure 16 subjects Petitioners to disciplinary sanctions, including suspension and loss of licensure. *Pet.* at 29; Or. Rev. Stat. §677.190.[7] Measure 16 subjects Petitioners to malpractice liability. *Pet.* at 26-28; Measure 16, § 4.02(3), *App.* 31a ("Nothing in [Measure 16] limits further liability for civil damages resulting from other negligent conduct or intentional misconduct by any person"). Measure 16 bars Petitioners, in contravention of their religious beliefs, from censuring, disciplining, or rescinding the privileges of any doctor who assists in a suicide on their premises. *Br. Amici Curiae of U.S. Cath. Conf. et al.* at 8. Thus, there is a direct, immediate infringement on Petitioners' associational and free exercise rights. "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). Such an the intrusion is effected by Measure 16 when it requires Petitioners to associate with, and allow in their organizational ranks, physicians who aid

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[7]Were it not for Measure 16, there would be no duty to inform patients of their "right" to assisted suicide, simply because no such "right" would exist. To suggest, as the Ninth Circuit did, that petitioners should have challenged Oregon's informed consent statute instead of Measure 16, ignores the ultimate source of petitioners' injury.

in suicides.

V. Drs. Lee & Petty have jus tertii standing.

Like the Petitioners with acknowledged jus tertii standing in *Glucksberg*, who "occasionally treat suffering, terminally ill patients," 117 S. Ct. at 2261, Drs. Lee and Petty properly assert the rights of their terminally ill patients to challenge Measure 16.

First, Drs. Lee and Petty themselves suffer injury as the result of Measure 16. Failure to abide by the various requirements imposed by Measure 16 on attending physicians when treating terminally ill patients would render them criminally and civilly liable. Second, the physician-patient relationship plainly warrants jus tertii standing here, as in *Glucksberg*. The relationship of attending physicians to patients who suffer both immediate, stigmatic injury and proximate future harm as the result of state-sanctioned assisted suicide is as least as significant as any relationship between physicians and patients seeking assisted suicide. Third, there are significant obstacles to patients asserting their own rights and interests. Prognosis of a terminal condition is uncertain and a mooted case threatens truly terminally ill persons. These difficulties are evident in this case. Plaintiff Dutson died before his claim was heard. Petitioner Elsner is said to be improperly before this Court because she has lived too long and it isn't certain she will die soon enough. Unless physicians may represent terminally ill patients, patients' rights may be violated with impunity by statutory schemes like Measure 16.

Petitioners Lee and Petty thus properly assert the rights of their terminally ill patients. *See Powers v. Ohio*, 499 U.S. 400, 411 (1991); *Singleton v. Wulff*, 428 U.S. 106, 112-116 (1976).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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